No. 92-357

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RUTH O. SHAW, *et al.*,
Appellants,
v.
STUART M. GERSON,
Acting Attorney General, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF AMICI CURIAE OF BOLLEY JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, AND PETER R. WALLACE, CHAIRMAN OF THE REAPPORTIONMENT COMMITTEE OF THE FLORIDA HOUSE OF REPRESENTATIVES, IN SUPPORT OF APPELLEES

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INTEREST OF AMICI

Amici Bolley Johnson and Peter R. Wallace are the Speaker and the Chairman of the Reapportionment Committee of the Florida House of Representatives, respectively.[1] In their official capacities, *Amici* have lead responsibility in the House for reapportionment in the State of Florida. Resolution of the issues presented in this case

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[1] Pursuant to Rule 37.2, the parties have consented to the filing of this brief. Letters memorializing their consent have been filed with the Clerk of this Court.

may profoundly affect the interests of *Amici*, and the State of Florida, in two ways.

First, this case raises important issues involving the extent to which race can be taken into account in the process of reapportionment. The resolution of these issues may well have a dramatic practical impact on the way reapportionment is conducted in the future. Moreover, because legislative districting decisions are constitutive elements of state sovereignty, any imposition of new federal constitutional limits on redistricting raises important federalism concerns. *Amici* wish to participate to ensure that the interests of the State of Florida, and of the States generally, are adequately considered in shaping appropriate constitutional principles in this critically important activity.

Second, because several counties in Florida are "covered counties" within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(b), resolution of the specific question posed by the Court in this case will shape the nature of the relationship between the State of Florida and the United States Department of Justice with respect to the preclearance process.

Moreover, *Amici* are presently Appellants in a case pending before this Court involving Section 2 of the Voting Rights Act, *Wetherell v. De Grandy*, No. 92-519,[2] *probable jurisdiction noted*, Feb. 22, 1993, and seek to make clear that eresolution of the fundamental issues presented herein, and potentially in *Voinovich v. Quilter*, No. 91-1618, *jurisdiction noted*, 112 S. Ct. 2299 (1992), as well, should have no bearing on the issues presented in No. 92-519.

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[2] A new session of the Florida legislature has commenced since the appeal was filed. As a result, Representative Johnson has replaced Representative Wetherell as Speaker. He will be substituted as a named Appellant in No. 92-519.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question framed by this Court for review appears to be a narrow one: whether a State's intent to comply with the Voting Rights Act, and the Attorney General's interpretation thereof during Section 5 preclearance, precludes a finding that the State's legislative reapportionment plan was adopted with invidious discriminatory intent, where the legislature adopted a plan that departed from suggestions of the Attorney General after preclearance review.

The Court's answer may, however, have a sweeping impact on States like Florida which contain substantial racial and ethnic communities of interest. Subsumed within the Court's question is an issue of fundamental practical and theoretical importance: to what extent does the Fourteenth Amendment restrict a State's consideration of race when reapportioning state legislatures and congressional districts after each decennial census?

Appellants offer a simple, but extreme, answer. Drawing on this Court's recent precedents prohibiting the race-conscious use of peremptory challenges,[3] Appellants contend that States may *never* consider race in reapportionment. *See* Brief of Appellants in No. 92-357 at 29-40 ("Appellants Br."). Alternatively, Appellants suggest, race may be considered only to the extent necessary to remedy proven racial discrimination against specific individuals. *Id.* at 52-53. Appellants expressly reject the argument that good faith efforts to comply with the requirements of the Voting Rights Act should rebut the charge of unconstitutionality. *Id.* at 52-53. They forthrightly call for overruling of *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977), and urge a regime of purported "color blind" reapportionment.

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[3] *Georgia v. McCollum*, 112 S. Ct. 2348 (1992); *Edmundson v. Lee Concrete Co.*, 111 S. Ct. 2077 (1991); *Powers v. Ohio*, 111 S. Ct. 1364 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Certain *Amici* have suggested a less categorical, but hardly less extreme, answer to the question posed by this Court. *Amicus* Republican National Committee ("RNC"), for example, argues that the consideration of race in reapportionment should "create a presumption of unconstitutionality" triggering strict equal protection scrutiny. *See* Brief *Amicus Curiae* of the Republican National Committee ("RNC Br.") at 2. If a State seeks to defend race-conscious districting as necessary to comply with the Voting Rights Act, RNC further argues, any such defense should be accepted only if the plan drawn by the State more closely conforms to purported "sound redistricting principles" than does any available alternative redistricting plan,[4] and only if the State's districts can be shown to lack partisan political purposes.[5]

The Florida House *Amici* believe the positions advanced by Appellants and their supporting *Amici* are fundamentally misconceived for three related reasons:

First, Appellants' arguments display little understanding of the bedrock realities of reapportionment. Reapportionment is, at bottom, an exercise in the allocation of political power. Identifiable interests within a State—individuals, classes of citizens (such as the aged), traditional racial, ethnic and religious communities of interest, regional interests, industries, and interests of every other kind—will have more or less influence in the legislature depending on where district lines are drawn. Precluding the consideration of race thus will not bring about "color blind" reapportionment. It will have the perverse consequence of disadvantaging minority citizens and communities of interest because they will be the *only* groups of citizens whose interests cannot be considered in the reapportionment process. (Point I).

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[4] *See* RNC Br. at 12-13; *id.* at 15 (North Carolina "cannot reasonably maintain that the Voting Rights Act justifies the challenged districts, particularly where less onerous plans consistent with the Act were rejected.").

[5] RNC Br. at 18-20.

Second, the constitutional standards Appellants propose are unrealistically indifferent to the requirements of the Voting Rights Act, and the needs of States seeking in good faith to comply with the Act. Both the amended Section 2 of the Act, as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the Section 5 preclearance process *require* a State to consider race in order to ensure compliance with federal law. Barring any constitutional consideration of race, as Appellants urge, would force States to choose between violating the Constitution or risking violation of the Voting Rights Act every time they redistrict. Applying strict scrutiny, as *Amicus* RNC urges, achieves results only slightly less pernicious. It will be extremely difficult for States to enact plans that are both the "least restrictive means" of complying with the Voting Rights Act (as strict scrutiny requires) and accomplish a workable accommodation of the myriad competing interests that any statewide reapportionment plan must reconcile. (Point II).

Third, this Court should reject *Amicus* RNC's invitation to subject the inevitable political accommodations of reapportionment to searching judicial scrutiny whenever States with sizeable minority populations must consider race in order to comply with the Voting Rights Act. The Constitution imposes no requirement that legislative districts be compact or contiguous. Nor does it, within very wide limits, preclude allocating districts to reflect the political strength of the major parties, to protect incumbents or to achieve a host of other political objectives. If adopted, RNC's proposed analysis would subject the redistricting plans of States with significant minority populations to a more stringent level of constitutional scrutiny than would be applied to other States. At bottom, RNC advocates strict scrutiny of state political judgments to which this Court has traditionally afforded great deference. RNC's standard is, moreover, inadministrable because there are no judicially manageable standards for

determining when allegedly partisan considerations have resulted in too substantial a departure from allegedly neutral districting criteria. *See Davis v. Bandemer*, 478 U.S. 109, 144 (1986) (O'Connor, J., concurring in the judgment). The apparent purpose, and certain effect, of such an approach will be to transfer to the federal judiciary virtually all reapportionment responsibilities and draw the judiciary into this political thicket. (Point III).

Amici also respectfully suggest that this Court's resolution of the question presented in the instant case should have no bearing on the issues presently before the Court in No. 92-519, *Wetherell v. De Grandy*. (Point IV).

ARGUMENT

I. A PROPER UNDERSTANDING OF THE REALITIES OF THE REAPPORTIONMENT PROCESS PRECLUDES ADOPTION OF STRICT CONSTITUTIONAL RULES FORBIDDING CONSIDERATION OF RACE.

A. Reapportionment Is, By Its Nature, A Process That Requires the Consideration and Accommodation of All Significant Interests Within A State.

Once each decade, state legislatures must engage in the extraordinarily difficult and time consuming process of reapportionment.[6] Ultimately, a State must choose a single reapportionment plan from an almost infinite variety of possible options.[7] The constitutional constraint

[6] "[T]he practice of redistricting is quite complicated. A great deal of time and money is spent on drawing and analyzing plans. Reapportionment staffs collect immense amounts of data and build or purchase sophisticated computer systems to aid them in their tasks. The legislators themselves sit through numerous meetings, arguing about various proposals and bargaining for a better seat. The legislative leadership, too, must devote time to putting together the votes for a bill, time that some would say could be better spent on more pressing policy matters." *See* B. Cain, The Reapportionment Puzzle 9 (1984).

[7] "The computer has revolutionized the methodology of reapportionment and redistricting. Infinite variations for legislative districting are now available at the push of a button. Neither legislatures nor courts are sure how to respond to this infinity of choice." McKay, *Introduction to Part I*, in Representation and Redistricting Issues 5 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds. 1982).

of "one person, one vote" imposes no significant limit on the number of possible districting plans that can be drawn: "it would require sheer happenstance or skilled agenda manipulation for even selfless, rational legislators to converge on only one." [8]

By their very nature, the lines drawn in a reapportionment plan will have effects—political, social and racial. As one commentator has noted:

> There is simply no way of drawing a redistricting plan without effects, both representational and partisan political. Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.

Backstrom, *Problems of Implementing Redistricting*, in Representation and Redistricting Issues, *supra*, 46. The Court has repeatedly recognized this essential characteristic of reapportionment. "The key concept to grasp is that there are no neutral lines for legislative districts. . . . [E]very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." *Davis v. Bandemer*, 478 U.S. at 129 n.10 (plurality opinion).[9] "Politics and political considerations are inseparable from districting and apportionment. . . . District lines are rarely neutral phenomena. . . . The reality is that redistricting inevitably has and is intended to have substantial political consequences." *Gaffney v.*

[8] Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1337 (1987).

[9] Quoting R. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in Representation and Redistricting Issues, *supra*, 7-8.

Cummings, 412 U.S. 735, 752-53 (1973). *See also Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).[10]

When state legislatures adopt a reapportionment plan, they do so with a ready appreciation of the likely political consequences of that plan.[11] With the advent of computer technology and the increased precision of our knowledge of demographics, the effect of any minor alteration in a districting map can be calculated fairly precisely. "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *Id.* The choice of one plan over other possible redistricting options, therefore, is inevitably and irreducibly political.

This non-neutrality is not simply unavoidable; it is a part of the democratic political process that has long been accepted and even honored. *See id.* As Justice

[10] *See Davis*, 478 U.S. at 129 n.10; *Kirkpatrick v. Preisler*, 394 U.S. 526, 554-55 (1969) (White, J., dissenting) ("In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend of political, economic, regional, and historical considerations."); Backstrom, *Problems in Implementing Districting*, in Representation and Redistricting Issues, *supra*, 45 ("gerrymandering is not merely an optical judgment as to whether districts snake too scandalously over a map. Instead it consists of one group of partisans gaining an undue advantage over another, even in regular-shaped districts."); Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1336-37 (1987) ("Most of the important districting criteria—especially compactness, preservation of political subdivisions, and competitiveness—that courts and other opponents of gerrymandering routinely invoke are not neutral either in the ideal sense . . . or in the weaker sense that the criteria do not systematically favor one party or another."). Although compactness has limited inherent virtue, its primary value is that it furthers the policies of protecting communities of interest and traditional political boundaries. *See* B. Cain, *supra*, at 33-50.

[11] "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis*, 478 U.S. at 129; *Gaffney*, 412 U.S. at 753.

White's opinion in *Gaffney v. Cummings* acknowledged, "districting . . . is intended to have substantial political consequences." Reapportionment implicates "fundamental choices about the nature of representation." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Interest groups and coalitions seek their preferred outcome in the political process in the form of district lines.[12] This is entirely consistent with the vision of the framers. *See* Federalist No. 56 at 351-52 (Henry Cabot Lodge ed. 1892).[13]

For these reasons, this Court has repeatedly recognized that reapportionment is the preserve of state legislatures, which are the appropriate bodies to balance the myriad of state and local policies at stake in redistricting decisions. *See Connor v. Finch*, 431 U.S. 407, 414-15 (1977). States may draw their districts to be compact and contiguous.[14] They may seek to preserve traditional political boundaries;[15] maintain communities of interest and residential patterns;[16] preserve incumbencies;[17] minimize contests

[12] Majority coalitions occasionally gain too much influence; the volatility of competing factions, however, ensures that such control is rare and short-lived. As some members of this Court have recognized, gerrymandering is a "self-limiting enterprise." *Davis*, 478 U.S. at 152-53 (O'Connor, J., concurring in the judgment).

[13] *See also* B. Cain, The Reapportionment Puzzle 179-80 (1984) (describing the Madisonian vision of institutions providing a forum for competing groups to form coalitions to advance specific policies).

[14] *See Connor v. Finch*, 431 U.S. 407 (1977); *Karcher v. Daggett*, 462 U.S. 725, 755 n.15 (1983) (Stevens, J., concurring).

[15] *See Mahan v. Howell*, 410 U.S. 315, 328 (1973).

[16] *See Karcher*, 462 U.S. at 734 n.6 (noting with approval the Colorado Constitution's preference for protecting communities of interest); *id.* at 776 n.12 (White, J., dissenting) (quoting a commentator decrying the shift from "preservation of community boundaries and the grouping of constituencies with similar concerns").

[17] *Anne Arundel County Republican Central Committee v. State Advisory Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 112 S. Ct. 2269 (1992); *Karcher v. Daggett*, 462 U.S. at 740.

between incumbents; strike a balance among regions (urban and rural, coastal and inland); allocate power between the predominant political parties;[18] or achieve a host of other overtly political objectives.[19]

Never before has the Court attempted to control these state policy choices.[20] To the contrary, recognizing that structuring the legislature to achieve a fair accommodation of contending interests is at the core of state sovereignty, this Court has severely constrained federal intrusion into the reapportionment process. *E.g. Upham v. Seamon*, 456 U.S. 37 (1982); *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Scott v. Germano*, 381 U.S. 407 (1965) (*per curiam*). Placing such policy balancing on a constitutional footing "embroil[s] the judiciary in second-guessing what has consistently been referred to as a political task for the legislature." *Davis*, 478 U.S. at 133.

State legislatures engaged in this extraordinarily difficult enterprise will as a matter of course consider how a proposed reapportionment plan affects the State's racial and ethnic minorities.[21] That is because, inevitably, some of a State's traditional communities of interest will be defined by a common race or ethnicity. There are traditional African-American, Hispanic or Asian communities of interest, just as there are traditional Irish, Polish,

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[18] *Gaffney v. Cummings*, 412 U.S. at 754.

[19] *See generally Baker v. Carr*, 369 U.S. 186, 323-24 (1962) (Frankfurter, J., dissenting).

[20] *See, e.g, Gaffney*, 412 U.S. at 752 n.18 ("compactness or attractiveness have never been held to constitute an independent federal constitutional requirement").

[21] Indeed, in enacting Sections 2 and 5 of the Voting Rights Act, Congress has mandated such consideration and has explicitly recognized that racial and ethnic minorities generally form identifiable communities of interest. *See* Part II, *supra*.

and Jewish communities of interest, and just as there are traditional rural communities of interest centering on common agricultural pursuits, coastal communities of interest centering on tourism or the fishing industry, urban communities of interest centering on a particular industrial base, and myriad others.

When state legislatures consider traditional racial communities of interest in this way, they are not, in any meaningful sense, engaging in race-based classification—even of a benign sort. They are not affording to a specified group, classified by race, a benefit or advantage not equally available to all citizens or groups. They are simply recognizing racially-defined communities of interest and affording to them the same consideration afforded every other community of interest in the reapportionment process.

Thus, when Appellants argue that reapportionment should be "color blind," they are not asking for equality of treatment. To the contrary, under Appellants' theory, a State could consider all group interests and accommodate them in the reapportionment process, *except* those of communities defined by race. The Fourteenth and Fifteenth Amendments were enacted largely to ensure that racial minorities would have the *same opportunity* as all other citizens and groups to participate in the political process. It would pervert these historic guarantees to hold that States must blind themselves to the interests of minority communities in the reapportionment process. Appellants' argument, if accepted, would have the effect of giving racial communities of interest less than equal opportunity.

B. This Court's Fourteenth Amendment Jurisprudence Casts No Doubt On the Legitimacy of Considering Race In Statewide Reapportionment.

Nothing in this Court's Fourteenth Amendment jurisprudence precludes, or requires strict scrutiny for, all

ocnsideration of racial interests by State legislatures engaging in reapportionment.

To the contrary, opinions of this Court have never found fault with a State's consideration of racial communities of interest in the reapportionment process. In *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court approved an annexation which "fairly reflected the strength" of the minority communities. In *Beer v. United States*, 425 U.S. 130 (1976), the Court found a reapportionment plan "ameliorative" and thus in compliance with Section 5 because the plan increased the number of majority-minority districts. In *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977), the Court upheld a race-conscious districting plan and the plurality noted that reapportionment "would often necessitate the use of racial consideration in drawing district lines." *Id.* at 159 (plurality opinion). The Court explicitly recognized that "the Constitution does not prevent a State . . . from deliberately creating or preserving [minority] majorities in particular districts." *Id.* at 161 (plurality opinion); *id.* at 165-68 (opinion of the Court). Finally, in considering the amended § 2, every Member of the Court agreed that a court must, in some fashion, consider minority voting strength, as well as other race-specific factors, in order to assess whether a State has complied with the requirements of the Act, as well as the Constitution. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). *See also Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980) (Opinion of Burger, C.J., White, J., and Powell, J.); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring).

These cases recognize the special characteristics of reapportionment that set it apart from other contexts where States are generally forbidden to use racial interests as a decisionmaking criterion. The creation of a majority-minority district simply acknowledges that there is a legitimate community of interest that is sufficiently cohesive

and compact that it would be able to elect a representative of its choice in a given district. In legislating to create majority-minority districts, the State determines whether such a community exists irrespective of race.[22] If a State can validly create a majority Polish or Catholic or rural district, because there is a legitimate community of interest which shares beliefs and concerns warranting a voice in the legislature, then a State must be able to afford minority communities of interest equal consideration in the reapportionment process.

That is not to say that consideration of race by a reapportioning body should never trigger searching Fourteenth Amendment scrutiny. Claims that race conscious redistricting constitutes intentional discrimination against minority groups plainly warrant heightened scrutiny. *E.g. Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Rogers v. Lodge*, 458 U.S. 613 (1982). A districting scheme which greatly overrepresents a racial minority in comparison to its proportion of the voting population might also, in some circumstances, give rise to an inference of invidious discrimination. But such issues are not presented in this case because Appellants' complaint to the three-judge court made no such allegations.

II. STATES MUST BE PERMITTED TO CONSIDER RACE IN THE REAPPORTIONMENT PROCESS IN ORDER TO COMPLY WITH THE VOTING RIGHTS ACT.

If, contrary to our arguments in Point I, this Court determines that the reapportionment decisions at issue in

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[22] This is a far cry from the "naked racial preference" embodied in a minority set-aside. Further, in redistricting, there is no injury to third parties because they retain an equal vote (especially, as here, where there is no dilution claim). *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265, 300 n.39 (1978).

this case are the kind of race-conscious government action generally subject to searching equal protection scrutiny, the positions advanced by Appellants and their supporting *Amici* must nonetheless be rejected because the Voting Rights Act *requires* States to consider race during reapportionment.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, makes illegal any State reapportionment plan that his discriminatory effects upon the voting rights of minority citizens. 42 U.S.C. § 1973(b). *See Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). To comply with Section 2, a State must consider the impact of any proposed plan on minority citizens in order to determine whether that redistricting plan minimizes or cancels out the voting strength of those citizens. *Gingles*, 478 U.S. at 44. Indeed, this Court has made clear that "[t]he 'right' question . . . is whether '*as a result of the challenged practice or structure* plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, 97th Cong., 2nd Sess. 28 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News at 177, 206) (emphasis added). To "answer this question, a court must assess the impact of *the contested structure or practice* on minority electoral opportunities." *Id.* (emphasis added).

Section 5 of the Voting Rights Act likewise *requires* the consideration of race in reapportionment. States like Florida, which contain counties subject to Section 5's preclearance requirements, may not implement reapportionment plans that have not been precleared. *See Chisolm v. Roemer*, 111 S. Ct. 2354 (1991). Preclearance requires a demonstration both that the proposed reapportionment plan is not "retrogressive," and, more broadly, that the plan does not deny equal electoral opportunity in violation of Section 2 of the Act. *Beer v. United States*, 425 U.S. 130 (1976). To avoid the difficulties attendant upon a denial of preclearance, a State must, as a practical matter, consider race in formulating a plan. Likewise, in responding to denial of preclearance, a State must, as a practical matter, consider race to remedy defects identified in the preclearance process[23]—as North Carolina did here.

If a State' consideration of race is entirely barred or subjected to strict scrutiny, reapportionment will be reduced to a game of chance. States will have to consciously blind themselves to ways proposed redistricting plans will affect minority voters, and then hope their enacted plans do not deny to minority voters an equal opportunity to elect their preferred candidates. The likelihood that a plan in compliance with the Voting Rights Act will emerge from this process of "color blind" reapportionment is virtually nonexistent. Thus, adoption of the position advanced by Appellants will force States to choose between considering race and facing a Fourteenth Amendment challenge from white voters, or ignoring race and facing a Voting Rights Act challenge from minority voters. The net effect of such a legal regime would be wholesale transfer of the reapportionment process to the federal courts.

Fortunately, nothing in this Court's Fourteenth Amendment jurisprudence requires such a result. Acting under the Fourteenth and Fifteenth Amendments, Congress has affirmatively required States to consider race in the re-

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[23] Indeed, under Justice Department regulations, a State seeking § 5 preclearance must submit a variety of race-specific information, inculding a "statement of the anticipated effect of the change on members of racial or language minority groups," 28 C.F.R. § 51.27 (n) (1992), race and language demographic information, *id.* at § 51.28(a), and a list of names of minority group members who would be "expected to be familiar with the proposed changes or who have been active in the political process," *id.* at § 51.28(h). Further, the regulations explicitly state that the submissions will be evaluated in a race-conscious manner. *See id.* at §§ 51.54 & 51-59.

apportionment process.[24] In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), three Justices set out the apporpriate standard: "a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation." *Id.* at 483 (Opinion of Burger, C.J., White, J., and Powell, J.) (emphasis added).[25] In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice O'Connor placed this principle squarely within the States' duty to satisfy their constitutional and statutory obligations. *Id.* at 291 (O'Connor, J., concurring). If States do not consider race, they may well design plans with a dilutive effect. The very enactment of the plan will then be a statutory violation, thus triggering a race-conscious remedy. To consider race beforehand is more than simple administrative efficiency; it is part of the State's affirmative duty not to discriminate. *See id.* at 290-91 (O'Connor, J., concurring) (noting the importance of voluntary compliance on the part of the States); *see also McDaniel v. Barresi*, 402 U.S. 39 (1971).

Indeed, in *City of Richmond v. Croson*, 488 U.S. 469 (1989), a case on which Appellants principally rely, this Court noted that there was a fundamental difference between independent race-conscious State action and such action taken pursuant to a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. "Congress may authorize, pursuant to section 5, State action that would be foreclosed to the States, acting alone." *Croson*, 488 U.S. at 491.[26] Under the Voting Rights Act,

[24] *Amici* do not understand this case to raise the issue of whether the enactment of the Voting Rights Act was a constitutional exercise of Congressional power.

[25] Three other Justices in *Fullilove* indicated their approval for such State action on other grounds.

[26] Quoting Bohrer, *Bakke, Weber*, and *Fullilove*: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment, 56 Ind. L.J. 473, 512-13 (1981)).

Congress has affirmatively commanded the States to prevent minority vote dilution and thus to consider race in redistricting.

If this Court nonetheless concludes that more exacting Fourteenth Amendment scrutiny is required, then, at an absolute minimum, a State must be entitled to consider race when, under *Thornburg v. Gingles*, the failure to consider race would create a *prima facie* violation of the Voting Rights Act. In *Gingles*, this Court established that the failure to draw minority-majority districts constitutes a *prima facie* violation of Section 2 whenever: (i) "[a] sufficiently large and geographically compact" minority group could constitute a majority in a single-member district, *Gingles*, 478 U.S. at 50; (ii) the minority group is "politically cohesive," *id.* at 51; and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*[27] Thus, if racially polarized voting exists and a State chooses to draw a minority district, that choice should not violate the Equal Protection Clause because it is necessary to ensure equal electoral opportunity for minority citizens. That is, without question, a compelling State interest.[28]

[27] The *Gingles* factors may be used in this manner because they define when membership in a minority group has independent political significance. If a minority group is politically cohesive and the white majority generally votes in a manner that is in opposition to the expressed preferences of members of the minority group, then the State has a compelling interest in considering the political interests of the minority group when drawing district lines.

[28] *Amici* do not believe that strict scrutiny should automatically apply whenever a State fails to show that the *Gingles* criteria can be satisfied. *See* Point I, *supra*. It may be, however, that the decision to draw minority districts absent a showing of systemic racially polarized voting was at the root of the district court's concern in *Quilter v. Voinovich*, 794 F. Supp. 695, 701 (N.D. Ohio 1992) (three-judge court), *probable jurisdiction noted*, 112 S. Ct. 229 (1992), *appeal pending*, No. 91-1619. If this Court should apply exacting Equal Protection scrutiny to the plan at issue in *Quilter*

Application of the "least restrictive means" part of the strict scrutiny test would, however, be wholly unwarranted in this context. Indeed, it is difficult to conceive of how that test would apply. Section 2 of the Voting Rights Act does not require proportional representation for minority citizens. 42 U.S.C. § 1973(b). Some State plans may, therefore, satisfy Section 2 even though they provide something short of proportional representation. But there is no fixed standard for determining how far below proportional representation a plan can fall without triggering Section 2 liability. It will, therefore, almost always be open to plaintiffs challenging a plan to argue that a State could have drawn one less minority district and still complied with Section 2.

Similarly, because modern computer science permits the instantaneous creation of an almost infinite variety of alternative reapportionment plans, it will virtually always be open to plaintiffs to argue that drawing district lines slightly differently would have been a "less restrictive alternative" than the one chosen by the State. As demonstrated, *see* Point I *supra*, the creation of a politically viable reapportionment plan requires the reconciliation of myriad competing claims and interests. The extreme difficulty required to reconcile competing interests in a workable plan provides a powerful reason for affording States reasonable latitude in their reapportionment choices.

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for this reason, that outcome should not affect the result in *Wetherell v. De Grandy* because the district court found racially polarized voting in the Dade County area. *See* Point IV, *infra*.

Furthermore, a State's justification would be less compelling if a reapportionment plan affords a minority class substantially more than statewide proportional representation. No such facts are alleged in this case, however.

III. THE POLITICAL JUDGMENTS THAT SHAPE A STATE REAPPORTIONMENT PLAN SHOULD NOT BE SUBJECTED TO SEARCHING JUDICIAL SCRUTINY MERELY BECAUSE A STATE MUST ALSO CONSIDER RACE IN ORDER TO COMPLY WITH THE VOTING RIGHTS ACT.

If this Court should decide that exacting equal protection scrutiny applies to the reapportionment decisions at issue here, the Court should not adopt the analysis advanced by *Amicus* RNC. That analysis requires judicial invalidation of any plan in which a minority district was intentionally created unless the particular district (i) conforms better to purported "neutral districting criteria" than other feasible options and (ii) is not the result of partisan motivations.

At bottom, RNC argues that the political component of reapportionment decisions should be subjected to more exacting equal protection scrutiny than would otherwise be appropriate whenever a State reapportionment plan also contains districts created for race conscious reasons. This proposal lacks any logical or conceptual moorings. If a State may legitimately engage in race-conscious action by drawing a district to give minority citizens equal opportunity to elect their preferred candidates, and, as here, the population patterns of the State permit more than one option for drawing that district, then the State's action will be equally race-conscious whether it chooses to create that district in one part of the State rather than another, or whether it chooses to draw that district in one shape rather than another. By choosing to create one possible district rather than another, a State may well be acting for some or all of the "political" purposes identified in Point I *supra*. But neither choice is more race conscious than the other; neither offends the proscriptions against race conscious decisionmaking more than the other. Thus, an equal protection principle designed to limit race-conscious redistricting would not be satisfied or violated to any greater or lesser extent by

choosing one option rather than the other for political but nonracial reasons.

The identical reasoning applies to the issue regardless of the Attorney General's position during preclearance review. Under the Act, the Attorney General's preclearance review role is limited to "interpos[ing] an objection" if a submission fails to satisfy § 5 requirements. 42 U.S.C. § 1973c. While the Attorney General may sometimes provide an explanation of the manner in which a proposed change is *not* free from discriminatory purpose or effect, it is beyond the scope of the Attorney General's statutory authority to mandate the implementation of any particular redistricting plan. *See id.* Even assuming that the Attorney General's denial of preclearance is accompanied by a specific proposed remedy—and *Amici* believe the Attorney General *never* specifies remedies—a State's decision to remedy identified vote dilution by drawing districts different from those suggested by the Attorney General does not render the State's conduct "more" race conscious, and hence worthy of more exacting judicial scrutiny. A decision to create an additional minority district in response to denial of preclearance will be equally race conscious no matter where in the State the district is created.

Thus, if a State may legitimately consider race in the reapportionment process for any of the reasons discussed *supra*, the choice of the actual districts themselves should be subjected only to the deference traditionally applied to claims of partisan gerrymanders. As this Court has often noted, "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power . . . in accordance with . . . voting strength and, within quite tolerable limits, succeeds in doing so." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973). *See also Carey*, 430 U.S. at 168; *Davis v. Bandemer*, 478 U.S. at 135 ("Relying on a single election to prove unconstitutional discrimination is unsatisfactory"). Indeed, in demanding judicial review for "compactness" and other purported neutral districting criteria, *Amicus* RNC seeks constitutional stat-

ure for criteria this Court has steadfastly refused to elevate to such heights. *See Gaffney*, 412 U.S. at 752 n.18 ("compactness or attractiveness have never been held to constitute an independent federal constitutional requirement").

That is not to say that a State may hide behind the Voting Rights Act to defend an unconstitutional partisan gerrymander. Nonetheless, the two types of claims, though similar, must be treated separately. A plaintiff who brings a racial gerrymandering case must prove a violation under whatever standard this Court decides should apply. A plaintiff who claims that race is being used for partisan purposes is nonetheless bringing a political gerrymandering claim.[29] The injury alleged is *not* based on plaintiff's membership in a racial group and the State's intent to harm that group or benefit another racial group; rather the injury is one to a political or other group and is derived from the State's intent to diminish that group's political power. Race is simply irrelevant to the claim, and should not trigger more exacting scrutiny than would otherwise apply to a claim of partisan gerrymander.[30]

The failure to respect this critical distinction would be devastating to core notions of federalism and comity.

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[29] Plaintiffs in this case bring a racial gerrymandering claim, albeit one under the Fourteenth Amendment *Amicus* RNC attempts to transform this case into a partisan gerrymandering case. This case, however, is about the use of race, not the use of political party affiliation. Furthermore, this Court has already affirmed the dismissal of the Republicans' "partisan gerrymandering" challenge to North Carolina's reapportionment plan in *Pope v. Blue*, 113 S. Ct. 30 (1992).

[30] If it is alleged that one effect of a political gerrymander is the dilution of minority voting strength, then that allegation might be subject to stricter scrutiny. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). However, no such allegation has been made in this case because the alleged partisan gerrymander did not dilute the voting strength of a suspect class.

State legislatures—not federal courts—are charged with establishing the policies to be incorporated into redistricting plans: " 'redistricting and reapportioning legislative bodies is a legislative task which federal courts should make every effort not to pre-empt'." *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)). *See also Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than a federal court").

Absent a violation of a constitutionally mandated requirement, a court may not trench upon this state power. To permit a district court to apply "neutral principles" would "[i]nvite attack on minor departures from some supposed norm [and] would too much embroil the judiciary in second-guessing what has consistently been referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from the legislative halls." *Davis v. Bandemer*, 478 U.S. at 133 (plurality opinion) (White, J.). Courts must be reluctant to undertake "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.* at 153 (O'Connor, J. joined by Burger, C.J. and Rehnquist, J. (now C.J.)) (quoting *Gaffney v. Cummings*, 412 U.S. at 754). *Amicus* RNC's proposal invites federal courts to "become bogged down in a vast, intractable apportionment slough." *Gaffney v. Cummings*, 412 U.S. at 750; *see also Davis v. Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring in the judgment) (arguing that partisan gerrymandering is a non-justiciable political question). The invitation should be refused.

IV. THE RESOLUTION OF THIS CASE SHOULD NOT AFFECT THE DISPOSITION OF WETHERELL V. DE GRANDY.

Amici also respectfully suggest that resolution of the issues presented here should have no bearing on the proper resolution of *Wetherell v. De Grandy*, No. 92-519. That is so for several reasons.

First, there is no allegation in *Wetherell v. De Grandy* that the State of Floirda violated the Fourteenth Amendment by taking race into account. To the contrary, the allegations are that the House reapportionment plan at issue, SJR 2-G, was insufficiently race conscious because it failed to create additional Hispanic house districts that could have been created.

Second, unlike *Voinovich*, there is no allegation in *Wetherell v. De Grandy* that the creation of Dade County districts in which Hispanic citizens could elect preferred candidates was unnecessary to comply with the Voting Rights Act, as construed in *Gingles*. To the contrary, the findings of the district court in *Wetherell v. De Grandy* demonstrate that the State of Florida did have a compelling interest in considering minority interests because Dade County is characterized by racially polarized voting and Hispanic citizens in Dade County are politically cohesive. *See Wetherell*, Civ. No. 92-40015, slip op. at 19 (N.D. Fla. July 17, 1992) (three-judge court) (applying *Thornburg v. Gingles*), *probable jurisdiction noted*, Feb. 22, 1993, *appeal pending*, No. 92-519.

Third, there is no allegation in *Wetherell v. De Grandy* that the districts created in the State's reapportionment plan departed so far from purported "neutral districting criteria" as to raise issues of the kind identified in this case by *Amicus* RNC. To the contrary, the plaintiffs in *Wetherell* merely alleged that the districts in their proposed alternative reapportionment plan were not worse than the districts in the state plan in terms of compactness. The district court specifically did "not find

that the districts drawn by the [] plaintiffs [were] significantly less geographically compact than those drawn by the state of Florida." *Id.*, slip op. at 34. Thus, even if *Amicus* RNC's untenable standards are adopted, there can be no claim that the districts in the state plan at issue in *Wetherell* violated those standards.

CONCLUSION

The judgment of the district court in *Shaw v. Gerson* should be affirmed.

Respectfully submitted,

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